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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TSIP PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF AMICI CURIAE ATTORNEYS GENERAL OF THE STATES OF CONNECTICUT, [illegible], MINNESOTA, [illegible], NEW YORK, [illegible], OREGON, [illegible], AND WEST VIRGINIA, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA

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INTEREST OF *AMICI*

Amici curiae, the Attorneys General of the States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Washington, and West Virginia, and of the Commonwealths of Kentucky and Pennsylvania, have a strong interest in this case because they are responsible for the public enforcement of laws protecting public health, safety and welfare.[1] *Amici* file this brief to urge the Court not to construe the Due Process Clause of the Fourteenth Amendment to prevent States from using punitive and exemplary damages to enforce important state policies and to deter egregious wrongful behavior directed at their citizens.

Almost all the Attorneys General are also directly responsible for enforcement of the criminal laws within their respective States. They therefore have a strong interest in avoiding an unwarranted construction of the Due Process Clause that would cast criminal sentencing procedures into constitutional doubt.

More broadly, the Attorneys General maintain a strong interest in preserving the appropriate balance of regulatory authority between the States and the federal government in our system of federalism.

As this brief will demonstrate, this case strongly implicates each of these interests.

SUMMARY OF THE ARGUMENT

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court strongly reaffirmed what has been the case law for centuries: that punitive damages may be assessed to punish and deter malicious wrongdoing. In Part I of this

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[1] The Attorneys General of the States of Alabama, Arkansas, Montana, North Carolina, and Washington join in Sections III and IV, and in the Conclusion, of this brief. The Attorney General of the State of West Virginia joins in this brief for the purpose of supporting the findings and decision of the Supreme Court of Appeals of West Virginia in the case under consideration.

brief, the Attorneys General urge this Court not to undermine that basic principle in the instant case, particularly where wrongdoing implicates fundamental state interests by threatening the system of consensual commercial exchange through contract and the sanctity of private property that lie at the heart of our economic system. The Attorneys General demonstrate that an award of punitive damages reasonably necessary to achieve the aims of deterrence and punishment does not violate substantive due process simply because it is significantly more than the plaintiff's out-of-pocket loss in the case and more than awards in other jurisdictions or against other defendants. Indeed, it is often the case that substantial punitive damages are needed where compensatory damages are modest, precisely in order to ensure that the State's objectives of deterrence and punishment are met.

In Part II, the Attorneys General urge this Court not to create a sweeping "proportionality" doctrine that would permit federal courts to invalidate state policies on the basis of the courts' own theories of "rational" deterrence or "retributive justice" and without regard to the interests articulated by the State. Such a doctrine would upset many settled state sentencing procedures.

In Part III, the Attorneys General show that this Court, having in *Haslip* approved fully adequate procedural protections which ensure that the requirements of due process are satisfied, should decline to go further and adopt any of the plethora of additional procedural measures proposed by petitioner TXO Production Corp. and its *amici*. This Court should not become an ongoing regulator of state punitive damages procedures, nor should this Court accept the thinly veiled invitation of TXO and its *amici* to transplant this Court's capital punishment jurisprudence to the punitive damages context.

Finally, in Part IV, *amici* demonstrate that States are responding to the punitive damages issue in responsible and politically accountable ways. This Court's decision in *Haslip* has provided all the constitutional guidance that is necessary. The matter is now chiefly a political one, to be decided by the People's elected representatives.

In sum, the present case does not raise the question of the assessment of multiple punitive awards for a single act or any of

the other issues that have led some to question the wisdom and fairness of punitive damages. This case involves the kind of deliberate, evil-minded wrongdoing that has given rise to punitive damages in this country for centuries. It is precisely the kind of case in which punitive damages function well, and uncontroversially, to vindicate state policy objectives through private enforcement and deterrence of serious harmful conduct.

ARGUMENT

I. IMPOSING A REQUIREMENT OF PROPORTIONALITY BETWEEN PUNITIVE AND COMPENSATORY DAMAGES WOULD IMPEDE THE STATES' INTEREST IN IMPOSING PUNITIVE DAMAGE AWARDS TO PUNISH AND DETER INTENTIONAL WRONGDOING

A. Punitive Damages Advance Important State Interests

"Punitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *see also Molzof v. United States*, 112 S. Ct. 711, 715, 717 (1992). In assessing the rational basis for punitive damages, this Court should give full consideration to the important role punitive damages play in advancing state policy objectives. Far from being a mere windfall to successful private litigants, punitive damages are an important adjunct to the States' efforts to enforce laws protecting consumers, the environment, and the public health and welfare in general.

First, the availability of punitive damages encourages private litigants to vindicate their rights in court. Particularly in cases such as the present one where out-of-pocket losses are small and noneconomic losses are uncertain, the availability of punitive awards provides a meaningful spur for private citizens to redress injuries done to them.

Second, punitive awards serve law enforcement purposes by providing an effective deterrent to conduct which might otherwise be profitable. The vast majority of States have decided, after substantial legislative deliberation in recent years, to retain

punitive damages as an important component of a comprehensive strategy for maximizing adherence to consumer, environmental, and public health and safety laws.[2]

Moreover, the availability of punitive damages is especially important in the present context because the States have a vital interest in protecting the system of private property and consensual commercial exchange through contract. Business in a State must be free, open and fair to all. A critical "rationale for punitive damages is their role of protecting the sanctity of the market system's structure of consensual exchange and production" and preventing parties from achieving by theft what they cannot achieve by market transactions. Werner Z. Hirsch, *Law and Economics: An Introductory Analysis* 200 (1988). Fraud and slander of title are among those types of business torts that run counter to the basic premises of the free enterprise system; of course, in this case, the West Virginia Supreme Court upheld the jury's finding that TXO had committed just this type of tort.

B. The Reasonableness of a Punitive Damages Award Cannot be Judged Merely by the Size of the Accompanying Award of Compensatory Damages, by Awards in Other Jurisdictions, or by Awards Against Other Defendants

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court endorsed the States' use of punitive damages "to punish what has occurred and to deter its repetition." *Id.* at 1045. The Court discussed the criteria employed by the Alabama courts to determine "whether a punitive award is reasonably related to the goals of deterrence and retribution":

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[2] Only Puerto Rico and Nebraska have chosen not to utilize punitive damages in any instance. Louisiana, Massachusetts, New Hampshire and Washington allow punitive damages only if they are expressly provided for by statute. By contrast, the remaining 45 States have indicated by statutory enactment or recent decision their approval of the constitutionality and usefulness of punitive damages.

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. The application of these standards, this Court concluded, "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages" and "ensures that punitive damages awards . . . have some *understandable relationship* to compensatory damages." *Id.* (emphasis added).

Thus, it is through the application of the factors discussed in *Haslip* — and not by the application of a proportionality review, comparison with awards in other jurisdictions, or other factors formulated by TXO — that punitive damages have an "understandable relationship" with compensatory damages. The "objective criteria" isolated in *Haslip*, *id.* at 1046, emphasize the principal role of punitive damages in punishing and deterring wrongful conduct. This Court did not envision some sort of arbitrary mathematical ratio or even a range of ratios between punitive and compensatory damages. Indeed, it expressly disavowed such an approach. *Id.* at 1043.

To focus exclusively on the actual harm caused by a defendant's conduct would be to exalt one of the factors identified in *Haslip* above all the others, or in the case of the additional factors advocated by TXO (such as "awards upheld against

other defendants in the same jurisdiction," Petitioner's Brief ("Pet. Br.") at 16), to introduce factors not even mentioned by this Court in *Haslip*. To replace *Haslip*'s "objective criteria," 111 S. Ct. at 1046, with petitioner's homespun "objective indicia" (Pet. Br. 16) would require nothing less than overruling *Haslip*.

Moreover, TXO's proposed calculus ignores the different circumstances of individual cases and the varying requirements of deterrence. Thus, the kind of intra-jurisdictional and inter-jurisdictional comparisons that TXO advocates in this case were squarely rejected by this Court in *Harmelin v. Michigan*, 111 S. Ct. 2680, 2696-99 (1991) (opinion of Scalia, J.); *id.* at 2704, 2707 (Kennedy, J., concurring in part and concurring in the judgment). To look to a plaintiff's out-of-pocket loss, to awards against other defendants, or to awards in other jurisdictions is misguided because it would ignore the *raison d'etre* of punitive damages: deterring and punishing wrongful conduct. Although as a general rule the factors on which TXO relies in assessing the reasonableness of punitive damages may not be irrelevant, they alone cannot be dispositive. For example, comparing awards against different defendants could well be an exercise in apples and oranges. As the West Virginia Supreme Court commented in the case under review, "an award that might be unreasonable if awarded against Jeff's Neighborhood Hot Dog Stand could be quite reasonable if awarded for the same conduct against McDonald's." Appendix to Petition for Certiorari, at 39a.

Similarly, in at least *some* cases deterrence will require that punitive damages exceed compensatory damages or out-of-pocket losses by a significant sum. As Justice Neely, who authored the decision below, explained in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991):

> Punitive damages are necessary when compensatory damages are not large enough to convince a defendant or future defendants to take precautions against similar problems. For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts.

Id. at 901-902 (citation omitted).

Indeed, punitive damages are most critically needed where a defendant's conduct carries the risk of great social cost but results in a particular case in a relatively small award of compensatory damages, or where a defendant expects to profit immensely from wrongdoing but the plaintiff suffers relatively few losses. In such situations, the mathematical ratio of punitive damages to compensatory damages is likely to be high, and the damages awarded may be greater than those typically recovered in other jurisdictions or against other defendants. But to invalidate the punitive damages award on those bases would run directly counter to the very purpose of punitive damages — to serve the social interest by deterring harmful conduct. Thus, if there is to be a "proportionality" inquiry, it should focus on the relationship between the award and both the *size of the wrongdoer's expected gain* and the *social cost* of the kind of activity in which the defendant has engaged. The damages award must also be judged with reference to (a) the probability that the wrongdoer would not be detected or punished and (b) whether the wrongdoer himself has covered up the extent of the plaintiff's actual damages or otherwise made them difficult to prove.

The Attorneys General urge this Court to reject any proportionality test that fails to consider whether the actual or out-of-pocket damages awarded by a jury are a reliable surrogate for the harm that the wrongdoer intended to cause, the benefit that the wrongdoer intended to reap, and the potential social costs of the wrongdoer's conduct. The Attorneys General also stress that the Due Process Clause "is not intended to embody a particular economic theory," *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), and does not require the States to adopt any particular socioeconomic assumptions as the basis of their systems of punitive damages. *See also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987) (the "Constitution does not require the States to subscribe to any

particular economic theory"); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part) (the Excessive Fines Clause is "not an economic primer on what factors best further the goals of punishment and deterrence"). In particular, due process does not require States which use punitive damages as deterrence to adopt as their lodestar the theory of "optimal" or "rational" deterrence advanced by TXO. *See* Pet. Br. 27-30. To the contrary, States are free to conclude that "an efficient legal system would try to eradicate property violations, not seek to optimize them." David D. Haddock, Fred S. McChesney, & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Calif. L. Rev. 1, 29 (1990).

C. There is No Need for "Heightened Scrutiny" Simply Because the State Policy is Implemented Through the Judicial System Rather Than by the Legislature

Because punitive damages are at bottom a form of state economic and public welfare regulation, substantive due process scrutiny of state rules for punitive damages awards should be governed by the deferential "rational basis" standard of review applicable to state regulations that do not infringe fundamental rights. *See Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). There is no need for heightened scrutiny on the asserted ground that punitive damages are imposed by civil juries rather than by state legislatures. Ever since de Tocqueville's *Democracy in America*, the function of the jury in American political life has been well-recognized. "[T]he jury can weigh the gravity of a wrong and determine the degree of the government's interest in punishing and deterring willful misconduct." *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991). Obviously, the jury's ability to fine-tune the regulatory functions of civil law to the circumstances of the individual case, and to apply a standard that the legislature remains free to alter, could not be performed by any other branch of government.

Furthermore, the States have overriding and constitutionally protected interests in allocating responsibilities as they see fit among their legislative, executive, and judicial branches. *See New York v. United States*, 112 S. Ct. 2408, 2418, 2421, 2432-33 (1992) (discussing Tenth Amendment and Guarantee Clause); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991). A State is free to impose punitive damages on common-law offenses as well as on statutory violations. There is, moreover, a complex dialectic among the branches of state government. For example, in many States, the legislature has restricted the ability of juries to impose punitive damages. See Part IV, *infra*. When a state legislature has *not* done so, its choice reflects acceptance of what is being done in judicial proceedings.

In sum, this Court should apply the same rational basis scrutiny to state systems of jury-awarded punitive damages that it does to state and federal socioeconomic legislation.

II. CREATION OF "PROPORTIONALITY REVIEW" BASED ON THE EXTENT OF THE "WRONG INFLICTED" WOULD THREATEN CRIMINAL SENTENCING PROCEEDINGS

TXO, focusing on the compensatory damages awarded to the respondents in this case and on their out-of-pocket losses, insists that principles of retributive justice limit punitive damages — as well as criminal penalties — "to an amount proportional to the wrong inflicted." Pet. Br. 26. The Attorneys General submit that this proposition would work a revolution in state criminal law and as well as in punitive damages law.

It is axiomatic that a criminal defendant, if convicted, may be punished according to state penal policies regardless of the extent of the damage he caused in his particular case, and even if he caused no palpable harm at all. Thus, there can be no question that a State, like Congress, "has the power to define criminal punishments without giving the courts any sentencing discretion" to account for the absence of any concrete social harm in individual cases. *See Chapman v. United States*, 111 S. Ct. 1919, 1928 (1991). Although in some contexts the "wrong inflicted" may be a relevant *factor* in sentencing — particularly

in increasing the criminal sanction imposed, *see, e.g.*, *Payne v. Tennessee*, 111 S. Ct. 2597 (1991) — a sentence cannot be said to be disproportionate merely because a defendant happened (fortuitously or otherwise) not to cause appreciable social harm in the particular case at issue. Thus, the West Virginia Constitution provides that "[p]enalties shall be proportioned to the *character* and *degree* of the offense," Art. III, § 5 (emphasis added), not according to the precise social impact of the particular defendant's conduct. If there is to be a proportionality inquiry,[3] the inquiry must center on the *type* of behavior in which the defendant has engaged, not on whether the defendant in the particular case at issue caused substantial out-of-pocket losses to the victim.

III. THIS COURT SHOULD NOT BECOME AN ONGOING REGULATOR OF THE SUFFICIENCY OF STATE PROCEDURES FOR ASSESSING PUNITIVE DAMAGES

In an *amicus* brief before this Court in *Haslip*, the Attorneys General of Alabama, California, and Texas warned that those attempting to craft judicial limits on state procedures for imposing punitive damages were inviting this Court to enter a judicial thicket comparable to that of the capital sentencing context. The Attorneys General warned that "[t]he due process arguments advanced by petitioner here are strikingly similar to those that led to this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). . . . [T]here is every reason to expect that resourceful counsel will bring to the courts an endless progression of due process challenges to punitive damages." Brief *Amicus Curiae* of the

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[3] *See Harmelin v. Michigan*, 111 S. Ct. 2680, 2686-91 (1991) (opinion of Scalia, J.) (Eighth Amendment and antecedent English tradition contains no proportionality requirement); *id.* at 2705 (Kennedy, J., concurring in part and concurring in the judgment) ("the Eighth Amendment does not require strict proportionality between crime and sentence" but forbids "only extreme sentences that are 'grossly disproportionate' to the crime").

Attorneys General of Alabama, California, and Texas in Support of Respondents, in No. 89-1279, at 12 (filed July 16, 1990).

That prediction has proved prophetic. The procedural safeguards sought by TXO and its *amici* include not only proportionality review,[4] but also a right to a bifurcated proceeding;[5] a right to admission of mitigating factors in the form of evidence relating to previous punitive damages awards against a defendant for the same course of conduct[6] and evidence relating to a defendant's attempts to comply with the law;[7] and a right to the exclusion of evidence relating to a defendant's wealth,[8] although at least one *amicus* representing corporate interests tries to have it both ways on this point.[9] Indeed, some *amici* would have this Court *go beyond* what the Eighth Amendment requires even in the death penalty context, by prescribing the "aggravating factors" that would constitute the

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[4] *Compare Pulley v. Harris*, 465 U.S. 37, 43-51 (1984) (no proportionality review required in a *criminal* case).

[5] See Brief of Product Liability Advisory Council, Inc., in Support of Petitioner, in No. 92-479, at 28 (filed Jan. 22, 1993).

[6] See Brief of Owens-Illinois, Inc. and Texaco, Inc. in Support of Petitioner in No. 92-479, at 17 (filed Jan. 22, 1993); Brief of Center for Claims Resolution in Support of Petitioner in No. 92-479, at 11 (filed Jan. 22, 1993).

[7] *See* Brief of Equal Employment Advisory Council in Support of Petitioner in No. 92-479, at 23 (filed Jan. 22, 1993).

[8] *See* Brief of Product Liability Advisory Council, Inc. in Support of Petitioner in No. 92-479, at 28-29 (filed Jan. 22, 1993); Brief of Owens-Illinois, Inc. and Texaco, Inc., in Support of Petitioner in No. 92-479, at 14 (filed Jan. 22, 1993).

[9] *See* Brief for the American Tort Reform Association, et al., Supporting Petitioner in No. 92-479, at 17-18 (filed Jan. 22, 1993) (arguing that "[t]here is, of course, a strong historical basis for considering poor financial condition as a *mitigating* factor in setting monetary punishments. And wealth may justify enhancing punitive damages for *individuals*," but insisting that wealth should not be a factor in justifying the imposition of punitive damages against "large, publicly held corporations.") (emphases in original).

exclusive bases on which States could impose punitive damages[10] and by decreeing strict mathematical ratios for punitive damages[11] — although several of TXO's *amici* concede "the inherent arbitrariness of a simple mathematical formula to determine punitive damages" and recognize that "it would be sheer fortuity if punitive damages awards that were determined only by reference to some multiple of compensatory damages resulted in rational awards."[12]

In *Haslip*, this Court approved baseline procedural protections that fully implement the requirements of due process. There is no need to go further by transplanting this Court's elaborate death penalty jurisprudence to the punitive damages context. Moreover, there is no need to countenance the contradictory positions taken by TXO and its *amici* in this case, which are exactly parallel to the tensions in the Court's death penalty jurisprudence identified by Justice Scalia in *Walton v. Arizona*, 497 U.S. 639, 656-674 (1990) (Scalia, J., concurring in part and concurring in the judgment). In its substantive due process argument, TXO claims that proportionality principles dating to Magna Carta require that a punitive damages award must be tailored according to the individual defendant's culpability. The punishment must fit the crime. Pet. Br. 25. But, when it comes to procedural due process, TXO insists that "jury discretion [must] be channelled," *see id.* at 33 — making impossible the kind of individualistic inquiry that is supposedly necessary to achieve proportionality. We are told that considerations of wealth must be excluded; aggravating factors must be closely circumscribed; perhaps even mathematical ratios are necessary. TXO itself maintains that the reasonableness of a punitive

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[10] *See* Brief of American Automobile Manufacturers Association, et al., Supporting Petitioner in No. 92-479, at 18-20 (filed Jan. 22, 1993) (proposing as the sole bases of punitive damages the "intentional infliction of harm" and the "conscious disregard of safety").

[11] *See* Brief of the Business Council of Alabama in Support of Petitioner in No. 92-479, at 18 (filed Jan. 22, 1993).

[12] Brief of Arthur Andersen & Co., et al., in Support of Petitioner in No. 92-479, at 13 (filed Jan. 22, 1993).

damage award should be assessed by reference to awards imposed under different circumstances, against different defendants, and in different States. *See* Pet. Br. 16. TXO does not even attempt to explain how this process could possibly produce individualized justice.

Perhaps in the unique context of the Eighth Amendment, where human life is at stake, such contradictions must be tolerated. There is no need to do so here.

IV. PRINCIPLES OF FEDERALISM AND JUDICIAL RESTRAINT DICTATE THAT THIS COURT LEAVE THE ISSUE OF "REFORMING" PUNITIVE DAMAGES TO STATE LEGISLATURES AND COURTS

This Court has repeatedly made clear that, under the Due Process Clause, States must be granted wide latitude to remedy "what are found to be injurious practices in their internal commercial and business affairs." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 107 (1978) (quoting *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949)). This principle has often been applied in cases involving due process challenges to the procedures through which States seek to vindicate public goals. *See Chandler v. Florida*, 449 U.S. 560, 582-83 (1981); *New Motor Vehicle Bd.*, *supra*.

Our federal structure of government "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "allows for more innovation and experimentation in government." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). "[S]tate innovation is no judicial myth." *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring). Unemployment insurance, minimum wage laws for women and children, and women's suffrage all originated in the States. *Id.* at 789. Similarly, "[a]fter decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation." *Id.* To promote the development of such sound public policies, this Court has recognized the need to leave breathing space for state experimentation.

Such breathing space is especially warranted now, because the States are in the midst of recrafting punitive damages law, both in response to this Court's mandate in *Haslip* and for reasons of public policy. Diversity among the States is a result of their experimentation and should not be misinterpreted as confusion or as defiance of *Haslip*. The States are the laboratories of democracy and are free to adopt varying approaches with respect to punitive damages so long as they stay within the broad bounds set by due process. After all, *Haslip* did not constitutionalize the Alabama punitive damages scheme.

States have ample practical incentives to limit punitive damages to the level necessary to accomplish important state objectives. States with punitive damages awards that are perceived as "excessive" quickly become known as "bad for business"; such States have difficulty attracting new firms and risk losing existing companies to neighboring jurisdictions. The active concern of States in promoting favorable business climates is manifested throughout the Nation.

The vast majority of States have recently put in place a broad array of measures for guiding and limiting the assessment of punitive damages.[13] Along these lines, a number of States have

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[13] In fact, only five States have *not* enacted tort reform legislation dealing with punitive damages in the past two decades. *See* Thomas Koenig and Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability* (to be published at 42 Am. Univ. L. Rev. (1993)), citing the following examples of reform legislation: Ala. Code § 6-11-20 et seq. (Supp. 1992); Alaska Stat. § 09.17.020 (1992); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1993); Colo. Rev. Stat. Ann. §§ 13-21-102, 12-25-127 (West 1989); Conn. Gen. Stat. Ann. § 52-240b (West 1991) (products liability actions); Fla. Stat. Ann. §§ 768.72 through .74 (West Supp. 1993); Ga. Code Ann. § 51-12-5.1 (Supp. 1992); Idaho Code § 6-1604 (1990); Ill. Ann. Stat. ch. 110, para. 2-604.1, 2-1207 (West Supp. 1992); Ind. Code § 34-4-34-2 (Supp. 1992); Iowa Code Ann. § 668A.1 (West 1987); Kan. Stat. Ann. §§ 60-3701 through 60-3703 (Supp. 1992); Ky. Rev. Stat. §§ 411.184, 411.186 (Michie 1992); Minn. Stat. Ann. §§ 549.19 (West 1988), 549.20 (West 1988 & Supp. 1993); Mo. Ann. Stat. §§ 510.263 (West Supp. 1992), 537.675 (West 1988); Mont. Code Ann. § 27-1-220 & 221 (1991); Nev. Rev. Stat. Ann. § 42.005 and 42.010 (Michie Supp. 1991); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1992); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1991); Ohio Rev. Code Ann. § 2315.21 (Anderson 1991); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases), 18.540, 41.315 (1991); S.C. Code Ann. § 15-33-135 (Supp. 1992); S.D. Codified Laws Ann. § 21-1-4.1 (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 et seq. (Vernon Supp. 1993); Utah Code Ann. § 78-18-1 (1992); Va. Code Ann. 8.01-38.1 (Michie 1992).

legislated caps on punitive awards in certain types of cases.[14] At least twelve States have acted to bifurcate the liability and damages phases of trials in which punitive damages are at issue, or require that a judge assess punitive damages once a jury has determined that they are appropriate.[15] Seven States have legislatively prohibited introduction of evidence of a defendant's financial condition until the jury has first determined liability for punitive damages.[16] Most States have established formal procedures for remittitur or post-verdict reduction to guard

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[14] *See* Ala. Code § 6-11-21 (Supp. 1992); Colo. Rev. Stat. Ann. § 13-21-102(1)(a) (West 1989); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Fla. Stat. Ann. § 768.73(1)(a) (West Supp. 1993); Ga. Code Ann. § 51-12-5.1(g) (Supp. 1992); Kan. Stat. Ann. §§ 60-3701(e), 60-3402 (Supp. 1992); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1991); Okla Stat. Ann. tit. 23, § 9 (West 1987); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1993); Va. Code Ann. §§ 8.01-38.1 (Michie 1992).

[15] *E.g.*, Cal. Civ. Code Ann. § 3295(d) (West Supp. 1993); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Ga. Code Ann. § 51-12-5.1(d)(2) (Michie Supp. 1992); Kan. Stat. Ann. §§ 60-3702, 60-3402 (Supp. 1992); Mo. Ann. Stat. § 510.263 (West Supp. 1992); Minn. Stat. Ann. § 549.20(4) (West Supp. 1993); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. Ann. § 42.005(3) (Michie Supp. 1991); N.D. Cent. Code § 32-03.2-12 (Supp. 1991); N.J. Rev. Stat. Ann. § 2A:58C-5 (West 1987); Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1991); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992).

[16] *See*, Cal. Civ. Code Ann. § 3295(d) (West Supp. 1993); Md. Code Ann. § 10-913(a) (1989); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. § 42.005(4) (Supp. 1991); N.J. Stat. Ann. § 2A:58C-5(a) (West 1987); Or. Rev. Stat. Ann. § 30.925(2) (1988); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992), Utah Code Ann. § 78-18-1(2) (Michie 1992).

against the imposition of awards tainted by passion or prejudice.[17] Other States have specified additional standards and safeguards for guiding the determination or review of punitive awards ranging from "safe harbor" provisions that exempt defendants from punitive damages if they have complied with government regulations, such as FDA rules,[18] to heightened standards of proof such as "clear and convincing evidence"[19] and even "beyond a reasonable doubt."[20] Finally,

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[17] *See, e.g.*, Ala. Code § 6-11-23 (Michie Supp. 1992); Ark. Code Ann. § 16-64-124 (1987); *Las Palmas Assoc. v. Las Palmas Center Assoc.*, 235 Cal.App.3d 1220, 1 Cal.Rptr.2d 301 (1991), *review denied*, 1992 Cal. LEXIS 752 (Cal. 1992); Colo. Rev. Stat. Ann. § 13-21-102(2) (West 1989); Fla. Stat. Ann. § 768.73(1)(b) (West Supp. 1993); *Pitts Truck Air, Inc. v. Mack Trucks, Inc.*, 173 Ga.App. 801, 803, 328 S.E.2d 416, 418 (1985); *O'Dell v. Basabe*, 119 Idaho 796, 810 P.2d 1082, *rehearing denied*, (1991); Ill. Ann. Stat. ch. 110, para. 2-1207 (West Supp. 1992); *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1238 (S.D.Iowa 1991); *Medical Mutual v. Evander*, 92 Md. App. 551, 609 A.2d 353, 370 (1992), *cert. denied*, 328 Md. 447, 614 A.2d 973 (1992); *Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670 (Minn. App. 1991), *review denied* (1991); Mont. Code Ann. § 27-1-221(7)(c) (1991); *Republic Insurance Company v. Hires*, 810 P.2d 790, 792-93 (Nev. 1991); *Ward v. Terminix Int'l Co.*, 1991 Tenn. App. LEXIS 387 (Tenn. Ct. App. May 29, 1991); *State Farm Mut. Auto Ins. Co. v. Zubiate*, 808 S.W.2d 590, 596, 606 (Tex. App. El Paso), *rehearing overruled* (1991); Va. Code Ann. § 8.01-38.1 (Michie 1992); *Heidman v. American Family Ins. Group*, 473 N.W.2d 14 (Wis. App. 1991).

[18] The following five States have enacted the "FDA defense": Arizona (Ariz. Rev. Stat. Ann. § 12-701 (West 1992)); New Jersey (N.J. Stat. Ann. § 2A:58C-5(c) (West 1987)); Oregon (Or. Rev. Stat. § 30.927 (1991)); and Utah (Utah Code Ann. § 78-18-1 (Supp. 1990)). Similarly, Illinois prohibits punitive damages in medical and legal malpractice cases (Ill. Ann. Stat. ch. 110, para. 2-1115 (West Supp. 1992)), Ohio requires proof by clear and convincing evidence in products liability cases (Ohio Rev. Code Ann. § 2307.80 (Anderson 1991)), and Oregon has a medical malpractice exception for licensed and registered physicians (Or. Rev. Stat. § 18.550 (1991)).

[19] *See* Alaska Stat. § 09.17.020 (1992); Ala. Code § 6-11-20(a) (Supp. 1992); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 681 (1986); Cal. Civ. Code Ann. § 3294(a) (West Supp. 1993); Fla. Stat. Ann. §§ 768.73-768.74 (West Supp. 1993); Ga. Code Ann. § 51-12-5.1(b) (Michie 1992); *Masaki v. General Motors Corp.*, 71 Haw. 1,

States have limited the access of plaintiffs to awards by enacting distribution restrictions that allocate a portion of every punitive damages award to the state or a source other than the plaintiff.[21]

The extent to which traditional methods for assessing punitive damages should be reformed is not a question readily amenable to judicial resolution. To the extent that punitive damages are perceived as being in need of reform, there is no consensus as to what shape those reforms should take. Different States are trying different approaches, which embody varying values and policies. Important empirical questions as to whether, and to what extent, punitive liability has increased are at the heart of this

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780 P.2d 566, 575 (1989); Ind. Stat. Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Stat. Ann. § 60-3701(c) (Supp. 1992); Ky. Rev. Stat. § 411.184(2) (Michie 1992); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Owens-Illinois v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992), *reconsid. denied*, 325 Md. 665, 602 A.2d 1182 (1992); Minn. Stat. Ann. § 549.20(1) (West Supp. 1993); Mont. Code Ann. § 27-1-221(5) (1991); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1991); N.D. Cent. Code § 32-03.2-12 (Supp. 1991); Ohio Rev. Code Ann. § 2315.21(C)(3) (Anderson 1991); 1986 Okla. Sess. Laws 315 sec. 1; Or. Rev. Stat. § 41.315(1) (1991); S.C. Code Ann. § 15-33-135 (Supp. 1992); S.D. Codified Laws Ann. § 21-1-4.1 (1987); Utah Code Ann. § 78-18-1(1)(a) (Michie 1992)); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 458 (1980)..

[20] *See* Colo. Rev. Stat. Ann. § 13-25-127(2) (West 1989).

[21] See Fla. Stat. Ann. § 768.73 (West Supp. 1993) (allocating 60% to either state's general revenue fund or public health trust fund); Ga. Code Ann. § 51-12-5.1(e)(2) (Supp. 1990) (allocating 75 percent to the state treasury); Ill. Ann. Stat. ch. 110, para. 2-1207 (West Supp. 1992) (allowing judge to apportion damages among plaintiff, plaintiff's attorney, and the Illinois Department of Rehabilitation Services); Iowa Code Ann. § 668A.1(2)(b) (West 1987) (allocating 75% after payment of costs and fees to a civil reparations trust fund); Kan. Stat. Ann. § 60-3402(e) (Supp. 1992) (allocating half of medical malpractice awards to the state treasury); Mo. Ann. Stat. § 537.675 (Vernon 1988) (allocating half of the award after payment of attorney fees to the Tort Victims Compensation Fund); N.Y. Civ. Prac. L. & R. 8701 (Supp. 1993) (allocating 20% to the state); Or. Rev. Stat. § 18.540 (1991) (allocating half of the award to the Criminal Injuries Compensation Account after deducting attorney fees); Utah Code Ann. § 78-18-1 (Michie 1992) (allocating half of any amount in excess of $20,000 to the State Treasury).

policymaking enterprise. Reforms also require difficult policy tradeoffs between deterring harm and promoting a favorable climate for attracting and developing business. These are questions that should be left to the elected representatives of the People in their respective States.

CONCLUSION

This Court should reject the challenges of TXO and its *amici* to the traditional and vitally important role of punitive damages in deterring and punishing egregious misconduct directed at the citizens of the several States.

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